CORRESPONDENCE.

WANTED—AN EXPLANATION.

Maia v. *Eastern State Hospital.*—5 Va. Law Reg. 534.

This communication is not intended as an ill-tempered criticism. The writer does not propose to be fault-finding, but the object in view is a sincere desire to reach an intelligent conclusion as to what is the law regulating a certain class of contracts. The want indicated seems to be urgent from certain recent deliverances of the Supreme Court of Appeals of Virginia, and, if the desired explanation can be given, a valuable service will be rendered.

The case of *Maia* v. *Eastern State Hospital* was decided by the Court of Appeals on the 16th of November, 1899, and the decision is reported in 5 Va. Law Register, 534-543. I call attention to the following quotations from the opinion of the court, delivered by Judge Buchanan. On page 540 of the REGISTER, where the case of *Eastern Lunatic Asylum* v. *Garrett*, 27 Gratt. 163, is discussed, we find this statement (my italics):

"It was held in that case, first, that by the laws of war property could not be taken *without compensation* for the purpose of feeding the inmates of the asylum; second, that the property having been taken without lawful authority, the plaintiff's title to it was not divested, and, it having been applied to the defendant's use, he could recover its value from the asylum in an action of trover. Although the action in that case was in tort, it could as well have been in assumpsit. 3 Rob. Pr. (new) 399.

"It was to recover the value of property which the defendant *had the right to purchase* for the maintenance of those entrusted to its care and pay for out of the appropriation made for that purpose by the State; and the plaintiff's property having been converted to the use of the corporation for the same purpose for which it *had authority* to purchase it, it ought to have paid for it, and the court very properly held that an action would lie *to compel it to do so.*"

In other words, if the corporation had *bought* the property, as it had the right to do, payment could have been *enforced;* the conversion of the property to the same use for which the corporation had the right to buy, did not change the liability. That is to say, the corporation was *liable on a contract made within the limits of its powers,* and the liability *could be enforced* The statement is distinct that payment *could be compelled.* The *method* of compulsion is not indicated, but it could *only* be by *subjecting the property* of the defendant to the satisfaction of the judgment. So that it seems a fair construction of the decision is that the corporation could be *compelled* to make payment *by the sale of its property, if need be.*

Now turn to page 541 of the REGISTER, and we find the following, as a part of the same opinion:

"It seemed to be conceded in argument that if the plaintiff could maintain his action and obtain judgment against the defendant he could not subject its buildings and grounds, or other property, to the satisfaction of the judgment, but would have to look to the legislature for payment. If this be so, *as we think it is,* it shows

that this action will not lie against the defendant, for if the plaintiff has no right to compel the defendant to compensate him for the grievance complained of, it is clear that he has no cause of action against it, for, as was said by Lord Holt in *White* v. *Ashby*, 1 Lead. Cas. 464, 483, 'it is a vain thing to imagine a right without a remedy; for want of right and want of remedy are reciprocal.'"

As stated by the editor of the REGISTER, in his note to this case (p. 544), "It follows that a duly authorized contract made by this hospital, or by any other purely public corporation in the State—for example, the University of Virginia, the Virginia Military Institute, the several lunatic asylums, the Deaf, Dumb and Blind Institution—is practically non-enforceable by law." That is to say, the court, in the statement last quoted, holds that a contract with a public corporation *can't be enforced;* that the property of the corporation *can't be sold*, and hence the contract affords no cause of action.

On page 540 it is held that the duly authorized contract of a public corporation *is* enforceable—that payment under it *can* be compelled; on page 541, in the same opinion, and immediately following, it is held that the property of a public corporation *can't* be sold—that the only course is an appeal to the legislature—that payment at all is a matter of grace, not of right, and, in a word, that the duly authorized contract of a public corporation *can't* be enforced.

If this is not a flat contradiction, in terms, what is it? Certainly the propositions are antagonistic. Which *one* of them, if either, is right? An explanation is wanted.

The editor of the REGISTER says: "This decision is clearly right." Which *portion* of it does he mean? He says, in his note, if it be true that public property can't be sold to satisfy a judgment in tort, the same result must follow if the judgment be on a contract. But the *court* says, in the opinion cited, that payment *can* be compelled under a *contract*, and then adds, what the editor construes to mean, that payment *can't* be enforced on a *judgment of any sort*. The question is repeated, therefore, which *portion* of this "strong" opinion does the editor consider as "clearly right?"

The case of *Phillips* v. *University of Virginia* was decided by the Court of Appeals on the 27th of September, 1899 (5 Va. Law Reg. 466), and it was there held that a mechanic's lien could not be enforced against the University buildings on the ground that public property, used for public purposes, is not liable to sale for the payment of debts.

In *Maia's Case*, according to the editor of the REGISTER, the court goes a long step further and holds that the duly authorized contract of a public corporation is *non-enforceable*. In the same case, however, the court also holds that payment *may be* enforced under a contract made by a public corporation *within its powers*.

It is unquestionably true that, stated broadly, public property cannot be sold for the payment of debts. But is that proposition correct with regard to public corporations such as the Asylum, the University of Virginia and the like? Certain public property is allotted them; they exercise certain powers; in the case of the University, for instance, it cannot contract any debt whatever on account of the University without the consent of the legislature previously obtained (Code 1887, sec. 1556). But, when the consent of the legislature *has been* previously obtained, and the contract is made *pursuant to that consent* (as was the case with the contract under which Phillips worked), is the idea that such a contract is not enforceable endurable?

The fact that special authority to make the contract had first to be obtained shows, with absolute certainty, that the contract, when authorized, was valid and enforceable. And yet, it is held that this is a mere *trick* on the part of the legislature; that the contract made under its authority was a *sham* and a *fraud*, and, as a consequence, a *necessary* consequence, however humiliating, that the State of Virginia can acquire property by resort to such shameful proceedings as this, at the expense of an innocent contractor, *and without paying a dollar for it.* To my mind this is *simply shocking.* The contract *must* be valid—it *must* be enforceable —the legislature, in consenting to the contract so intended—and it may be enforced, if need be, by a sale of the property held by the corporation, because that is the only source of payment *possible*, and must be held to have been the basis with reference to which the contract was permitted.

While the property held by the corporation may be public, *as to the contract whose execution is specially authorized*, the property is *private*, and becomes liable for a breach of the contract. In other words, when a public corporation, like the University of Virginia, is authorized by the legislature to contract a debt, it is thereby permitted to act for its *private advantage*, so to speak—it acts for *itself*, not as a State agency, and, having no other basis of credit, such as the power of taxation, its property must be liable for the faithful performance of the undertaking. A contract thus made *defines rights*—it is intended to do so, and "it is a vain thing to imagine a right without a remedy." If not enforceable *against* the University of course it is not enforceable *by* it, and so the action taken by the University in the Langley contract (as shown by the record in the Phillips case) whereby the University took possession of the Langley's tools and materials at the time of his failure, was totally unwarranted.

With profound respect for the very high authority which treats contracts by public corporations as non-enforceable, I venture to say that there may be error in the opinion.

The University of Virginia, by legislative authority, issued bonds and secured them by a trust deed on the University property for the purpose of raising money to rebuild after the fire. Each of these bonds is a *contract*—the trust deed securing them is a *contract.* If the opinion given is sound, these bonds and that trust deed are non-enforceable. Will any one say that is true? But if contracts like that are enforceable, *and they must be*, why are not *other contracts made under legislative sanction also enforceable?* Will any one say that if the University makes default in the payment of her bonds, the bondholders must go to the legislature and *beg* for payment as a *favor*, instead of proceeding under their trust deed and enforcing their rights? Hardly. And if a judgment is obtained against the University on a duly authorized contract, may not the lien of that judgement be enforced by a sale of the University *property*, just as in the case of a sale under the *deed of trust?*

These things are vital—they need explanation. If it be true that the law-making power of the State cannot authorize a public corporation to make an enforceable contract; if the State cannot make a law by which *public* property is made liable for public benefit, is there any reason for saying it can make a law putting *private* property on a different footing? And if it cannot legislate as to private or public property, what power has it?

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